

Everyone should have a will.
 But many people delay
 or avoid making the
 decision because of two
 misperceptions.
 First, you cannot draft
 a will by yourself;
 you need an attorney.
 Second, you do not
 need a will if you own
 no property.

In truth, an attorney is not required. Texas recognizes two types of written wills: a *holographic* will (one entirely in the deceased's handwriting) and an *attested* will (one not entirely in the deceased's handwriting), such as a typewritten will. A holographic requires no witnesses while an attested will requires at least two. So, in essence, you can draft your own will, especially if it is holographic.

While an attorney is not required, his or her expertise is recommended to:

- comply with the legal requirements to validate the will,
- meet the special needs of certain beneficiaries,
- make sure *all* of your assets are properly distributed without ambiguity and
- avoid death taxes, to the extent possible, such as federal gift and estate taxes associated with large estates.

If you have no assets, do you still need a will? The answer is probably *yes* for two reasons. First, if you have minor children, the will is the primary vehicle by which you appoint a guardian. Second, if you subsequently receive assets before or after you die, your will determines the distribution.

On the other hand, you can own a large estate and still not need a will. Some assets transfer at death without need of a will. These are known as nonprobate assets and include such things as jointly owned property held as joint tenants with the right of survivorship. The same goes for accounts payable on

death. Likewise, a life tenant's interest in a life estate passes to the designated recipients known as remaindermen when the life tenant dies. (For more information on probate-avoidance techniques, see publication 1106, "Five Ways to Avoid Probate.")

If you die without a will (intestate) and have assets subject to probate or if you die testate but do not dispose of all your assets in the will, how is this property divided?

In Texas, distribution depends on:

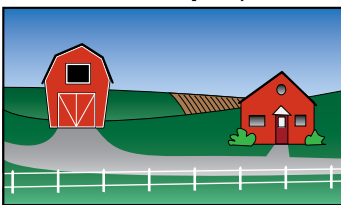
- whether the property is real or personal, separate or community and
- whether you are survived by a spouse, children (or their descendants), or any next of kin.

With this in mind, the rules of descent and distribution found in Sections 38 and 45 of the Texas Probate Code (TPC) govern the division. These rules are sometimes referred to as the rules of intestate succession.

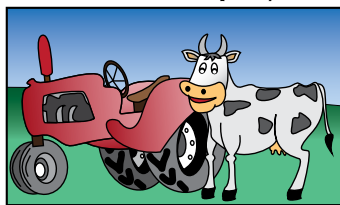
Before describing the rules, an overview of what constitutes real and personal property, and the difference between separate and community property, is necessary.

Real property includes land (real estate) and everything firmly attached to it. Trees, houses and barns are good examples. *Personal property* is any tangible or intangible property not affixed to the ground. This includes vehicles, cattle, farm machinery and bank accounts.

Real Property



Personal Property



Community property includes any property (real or personal) acquired during a marriage except property acquired by one spouse by way of gift, devise or inheritance. Each spouse owns an undivided one-half interest in this property. However, if a parent or relative gifts (gives) or devises (wills) property solely to one spouse (excluding the other), this property, even though acquired during the marriage, is that spouse's *separate property*. Any property acquired prior to the marriage remains the separate property of that spouse unless the other spouse's name is added to the title.

Community Property



Separate Property



Division of Separate Property (Real and Personal)

Assume you own community property (including a home, car and truck) with your spouse. Also, you have a farm, cattle and machinery that you inherited as your separate property from your parents. You have no children by this marriage, a prior marriage or out of wedlock.

If you die intestate (without a will), how is your separate property divided?

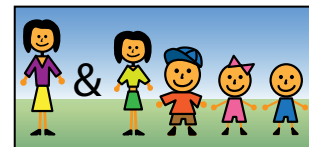
Distribution of separate property is described in Section 38 of the TPC. It comprises two categories, real and personal. In this case, the farm is real property and the cattle and machinery are personal. Three variables determine the distribution.

- Is there a surviving spouse?
- Are there surviving children (or their descendants)?
- Are there surviving relatives such as parents, brothers and sisters, aunts, uncles or grandparents?



Spouse Only and No Children (or their Descendants)

If you die intestate survived by a spouse and no children (or their descendants), your spouse gets all your separate property, both real and personal property.

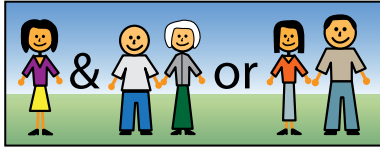


Spouse and Children (or their Descendants) Only

If you are survived by a spouse and children (or their descendants), your spouse receives one-third of the separate *personal* property (the cattle and the machinery), and the children (or their descendants) get the remaining two-thirds.

As to the separate *real* property (the farm), your spouse receives a life estate in one-third of the land. Your children (or their descendants) get two-thirds of the real property immediately and the remaining one-third when the spouse dies.

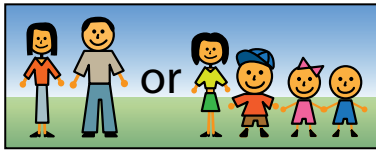
The issue of what happens to the primary residence located on the premises is discussed later.



Spouse and Parents (or their Descendants) Only, No Children

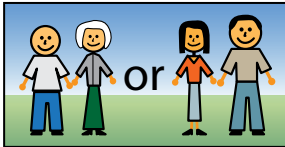
If you are survived by a spouse and your parents or their descendants (meaning your brothers and sisters), your spouse gets all your personal property and half of the separate real property. The parents or their descendants share in the other half of the real property according to the degree of kinship described later.

If you have no surviving spouse, then there is no differentiation between how real property and personal property is divided. It goes together.



Children (or their Descendants) Only

If you are survived solely by children and no spouse, all your separate property, real and personal, goes to your children (or their descendants).



Parents (or their Descendants) Only

If you are survived by your father and mother, no spouse and no children (or their descendants), your separate property, both real and personal, will be divided equally between your father and mother. If only one parent is alive and you have no surviving brothers or sisters (or their descendants), then all your separate property goes to the surviving parent. However, if you have surviving brother(s) or sister(s) (or their descendants), then the surviving parent gets half the separate property, and your brother(s) and sister(s) (or their descendants) share in the other half.



Brothers and Sisters Only

If you have no surviving spouse, no surviving children (or their descendants), and no surviving father or mother, then all your separate property, whether real or personal, goes to your surviving brothers and sisters or their descendants.



Maternal and Paternal Grandparents (with Possible Descendants)

If there is no surviving spouse, no surviving children (or their descendants), no surviving parents and no surviving brothers or sisters (or their descendants), your separate property is divided equally between your maternal and paternal grandparents.

If the only survivors are your four maternal and paternal grandparents, half of the property goes to each side of the family. Each grandparent receives one-fourth of your separate property or one-half of the half going to that side of the family.

If one grandparent is dead and he or she had no surviving descendants, the surviving grandparent on that side of the family gets one-half of the separate property. But, if a deceased grandparent had surviving descendants, such as your aunts and uncles or cousins and nephews, then the surviving grandparent gets one-fourth, and the descendants of the deceased grandparent share in a fourth.

No Maternal or Paternal Grandparents

If both the maternal and paternal grandparents are dead (and both had descendants), the descendants on each side of the family share in the half of the separate property going to that side of the family. If one set of grandparents is deceased and had no descendants, the descendants on the other side of the family share in all the separate property.

According to the statute, the distribution of the separate property never extends to the great-grandparents or their descendants. If no descendants of your maternal or paternal grandparents can be found, (and you have no other survivors mentioned earlier) the separate property transfers (escheats) to the state of Texas.

Distribution of Community Property (Marital)

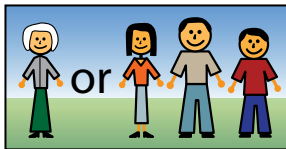
The rules of descent and distribution associated with community property are simple compared with separate property. The reason is twofold. First, the law makes no distinction between real and personal community property. Both are treated the same. Second, the distribution is limited to the surviving spouse and/or the deceased's surviving children (or their descendants). While there may be no surviving children, *there will always be a surviving spouse*: otherwise, no community property can exist.

Rules for distributing community property when the first spouse dies intestate are found in Section 45 of the TPC. In the opening example, the community property consists of the home and the vehicles.



Surviving Spouse Only

If you die intestate survived by a spouse and no children (or their descendants), your spouse gets your half of the community property, regardless of whether it is real or personal. The surviving spouse becomes vested with all the property that was formerly community property. It now becomes the surviving spouse's separate property.



Surviving Spouse and Children (or their Descendants) Only

The presence of surviving children (or their descendants) changes the distribution.

If all your surviving children (or their descendants) are from this marriage and none from prior marriages or out of wedlock with someone other than your surviving spouse, your spouse still gets your half of the community property as before. However, if any of the surviving children (or their descendants) are from another marriage or out of wedlock with someone other than your surviving spouse, then all your children (or their descendants), regardless of origin, receive your half of the community property. The surviving spouse keeps his or her half.

The statute states it this way. Your spouse gets your half of the community property if "all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse." The statute adds, "In every case, the community estate passes charged with the debts against it." In other words, whoever gets the property gets the responsibility for paying debt (or lien) against it.

Because the debt (or lien) follows the community property, the recipient(s) may wish to disclaim or renounce the inheritance when the debt approximates or exceeds the value of the property. The procedure is outlined later.

Children (or their Descendants) Only

The statute does not address this situation because if there is no surviving spouse, then there can be no community property to divide. If there is no surviving spouse, all the deceased's property is his or her separate property and will be distributed according to Section 38 discussed earlier.

Special Rules

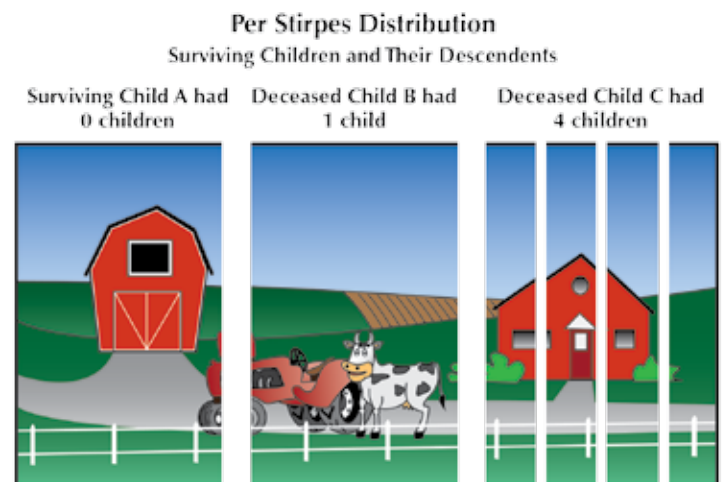
In specific situations, special rules apply. Here are four.

(1) *Per Capita or Per Stirpes?* (Section 43, TPC)

When a group such as all your brothers or sisters (or their descendants) is entitled to receive property, how is the property apportioned among them? For example, assume you have three children (A, B and C) from two marriages. A has no children, B has one child and the C has four children. You die intestate. How is your half of the community property divided among them?

If all three of your children survive you, each receives one-third of your half of the community property. Each stands in the *first or same degree of inheritance* (Section 43). The distribution is on a per-person or per-capita basis. But what happens if the B and C predecease you, and only A is living?

Here, A stands alone in the first degree of inheritance. So, A still gets one third of your half of the community property. The surviving children of B and C share in the portion that otherwise would have gone to the parent had he or she survived. B's surviving child gets one-third of one-half of the community property that would have gone to B. C's four surviving children each get one-fourth of the one-third of the one-half of the community property that would have gone to C. This is known as a *per stirpes* distribution.



What happens if all three of your children predecease you? Now who stands in the first or same degree of inheritance? This would be your grandchildren. Remember, those standing in the first or same degree receive property on a per capita basis. Thus, each of the surviving five grandchildren receives one-fifth of your one-half of the community property on a per capita basis.

What if one or more of the grandchildren predecease you? How does this affect the distribution?

It depends on whether the predeceased grandchildren had any survivors (your great-grandchildren). Assume two of the five grandchildren predeceased you and neither had any descendants. In this event, the remaining three grandchildren each receive one-third of your half of the community property per capita. If one of the two predeceased grandchildren had a surviving child, then the property is split four ways. Each of the three surviving grandchildren gets one-fourth of the one-half per capita, and the great-grandchild gets the other one-fourth per stirpes (the part that would have otherwise gone to your grandchild had he or she survived).

(2) Adoptees

Another special rule deals with adoptees (Section 40, TPC). Are they treated differently from natural biological children when an adoptive parent dies intestate? The answer is *no*.

Adoptees are treated as natural descendants of the parents who adopted them. And, should the case arise, the parents can receive property through the adopted child. It goes both ways.

What about the biological parents? Can the adoptees still receive property by descent and distribution from their biological parents? The answer is *yes*, but the biological parents cannot receive property from or through the adopted child. It only goes one way.

There is one exception. The previous rules apply to adopted minor *children*. According to statute, a couple can adopt another adult with his or her consent. Likewise, one adult can adopt another adult, and one spouse in a marriage can adopt an adult

without the other spouse's consent or joining in the adoption (Sections 162.501 through 162.507, Texas Family Code).

That being said, here is the exception. The adopted adult is viewed as the son or daughter of the adoptive parent (or parents). But the adopted adult can no longer inherit from his or her biological parents. Only adopted minor *children* can do this.

(3) Disclaimers and Renunciations

There is another special rule regarding disclaimers and renunciations (Section 37A, TPC). Any person entitled to receive property by devise (by will) or by inheritance (by descent and distribution) may disclaim or reject the receipt of the property in whole or in part. The right of rejection extends not only to the recipient but to his or her legal guardian, personal representative, independent executor or a person acting under a durable power of attorney that authorizes disclaimers.

The disclaimer must be in writing and acknowledged before a notary or anyone authorized to take acknowledgments. The disclaimer must be irrevocable and filed in the probate court where the deceased's will is being or has been probated. If there is no probate, the statute specifies where the disclaimers must be filed.

Unless the deceased's will specifies otherwise (when dealing with devised property), the disclaimed property passes as if the person filing the disclaimer predeceased the maker of the will. A disclaimer could affect whether property is distributed per capita or per stirpes described earlier.

(4) Homestead Property

One special rule or exception applies when real property serves as the primary residence for the married couple. Texas homestead laws afford special protection to the surviving spouse

and the deceased's minor children. The Texas Constitution and Texas statutes protect the surviving spouse and minor children from eviction when, upon the death of the first spouse, title to the homestead passes, in whole or in part, to a third party by will or by inheritance.

In either case, Texas homestead laws give the surviving spouse the right to live in the home (the primary residence) for the rest of his or her life (a life estate) without eviction. The law gives the same benefit to the deceased's minor children until they become adults.

Consequently, possession of the homestead when devised or inherited by anyone other than the surviving spouse is suspended until the surviving spouse dies or abandons the home and/or the minor children reach adulthood. The law does not allow the partitioning of the homestead between the surviving spouse and the minor children. 📍

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THE TAKEAWAY

Texas' Probate Code spells out precisely who inherits real and personal property when someone dies without a will. By drafting a will, you can decide for yourself who gets what.



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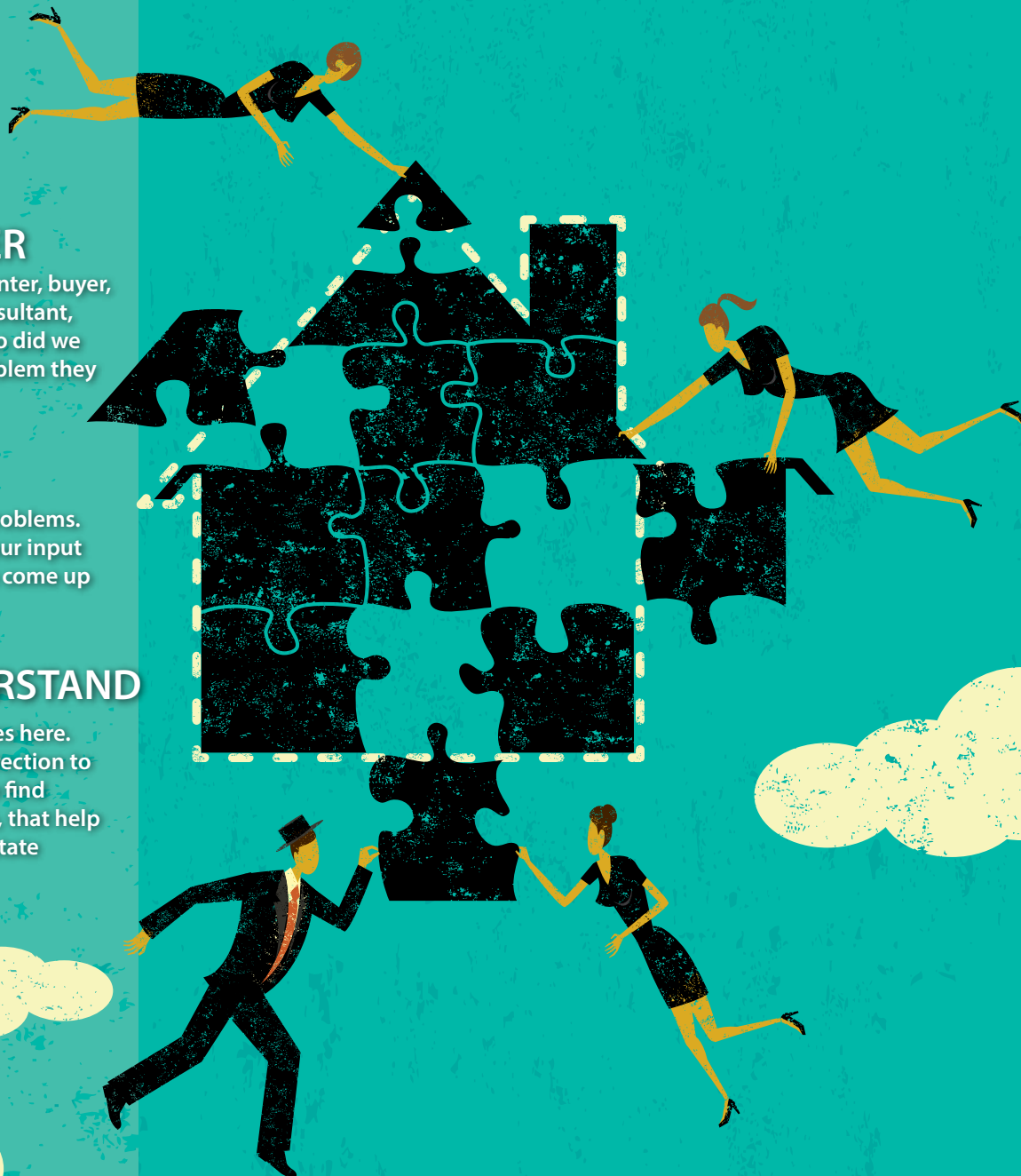
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